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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 ERIC GLATT, on behalf of
himself and all others
similarly situated, et al.,

5 Plaintiffs,

6 v.

11 CV 6784 (WHP)

7 EDEN M. ANTALIK and FOX
SEARCHLIGHT PICTURES, INC.,

8 Defendants.

9 -----x
10 New York, N.Y.
11 June 4, 2012
12 12:00 p.m.

13 Before:

14 HON. WILLIAM H. PAULEY III,

15 District Judge

16 APPEARANCES

17 OUTTEN & GOLDEN, LLP
Attorneys for Plaintiffs
BY: ADAM T. KLEIN
ELIZABETH WAGONER

18 PROSKAUER ROSE, LLP
Attorneys for Defendants
BY: ELISE M. BLOOM
AMY F. MELICAN

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1 (Case called)

2 THE COURT: Please be seated.

3 MS. WAGONER: Elizabeth Wagoner, with Outten & Golden,
4 for the plaintiffs.

5 MR. KLEIN: Adam Klein, Outten & Golden, also for the
6 plaintiffs.

7 MS. BLOOM: Good morning, your Honor. Elise Bloom,
8 Proskauer Rose, for the defendants.

9 MS. MELICAN: Amy Melican, Proskauer Rose, also for
10 the defendants.

11 MS. BLOOM: Your Honor, Mancuso is our IT person, and
12 I just brought him because I didn't know the extent to which
13 ESI was going to be an issue, but he won't be speaking on the
14 record unless you ask.

15 THE COURT: Thank you. Good morning.

16 We have a couple of issues to deal with. I'd like to
17 turn first, before we get to the discovery disputes, and deal
18 with Searchlight's proposed motion to strike plaintiffs' class
19 and collective allegations.

20 Ms. Bloom, isn't that motion really premature?

21 MS. BLOOM: Your Honor, it's not premature at this
22 juncture, and we thought about raising it initially when the
23 complaint was first filed, but the difference between now and
24 then is that there has been some discovery.

25 THE COURT: But discovery's not complete, and, as is

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1 evidenced by the letters that I've gotten, you're resisting
2 discovery.

3 MS. BLOOM: In terms of discovery not being --

4 THE COURT: Does it really make any sense to file this
5 kind of motion, especially when you've got to be familiar with
6 my decision in Chinenski in which I said this is frowned upon.
7 My frown is not going to turn into a smile on this motion.
8 You'll have a chance when there's a motion for collective
9 action to address it on the merits.

10 MS. BLOOM: Your Honor, I am aware of your decision,
11 and why we believe that the situation is different, and again,
12 we're not saying no discovery; our position is that to the
13 extent that what discovery should remain should be anything
14 focused on what the plaintiffs believe they would need either
15 for a motion for notice or for class certification and they've
16 noticed these 30(b)(6) depositions. They've noticed these two,
17 or they have subpoenaed but then they cancelled, I think that
18 they're going to reschedule these two depositions for people
19 that worked on Black Swan, we think that should go forward.
20 But with regard to broad-based discovery, we believe that based
21 on the discovery that's been conducted to date that it is
22 appropriate at this point to limit discovery to issues that
23 would go to the certification and the collective action.

24 The other thing I would point out, your Honor, is that
25 there is at least some precedent in this type of a case for

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1 proceeding in this way. There is another case just like this
2 that was filed by the plaintiffs' counsel against the Hearst
3 Magazine Group. It's pending before Judge Baer. Magistrate
4 Judge Peck is the magistrate on that case. In that case, at
5 the outset, a motion to strike was filed, and Judge Baer in
6 that case, my understanding, has limited discovery to the class
7 type issues and is then going to entertain that motion. And
8 while I understand that wouldn't be binding on your Honor, I do
9 think this type of claim involving interns is so fact specific
10 that we believe that there are no circumstances under which a
11 class could ever be certified. You've got the FLSA piece and
12 then on the Rule 23 piece you've got the additional problem of
13 the Rules Enabling Act, which, under the Duke decision, because
14 we will have individualized defenses to each claim because it
15 won't be enough for the plaintiffs to say this person worked
16 and wasn't paid, our defense is that person was an intern and
17 therefore not entitled to be paid, and that determination is
18 going to turn on the individual facts that the Department of
19 Labor has set out, and we will have an individual defense for
20 each person. There is no common answer, as the Court pointed
21 out in Dukes.

22 So given the fact that we believe that it is virtually
23 impossible that a class would ever be certified in this case,
24 we would ask that you entertain our motion to strike after
25 whatever limited discovery is necessary in order for the

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1 plaintiffs to be prepared to respond to that.

2 THE COURT: All right. I can't prevent you from
3 filing such a motion, but I really think that your time and
4 effort could be better spent on other things.

5 Let me hear from the plaintiff for a moment.

6 MS. WAGONER: Your Honor, we agree that this motion is
7 premature, and in our view what's really going on here is the
8 defendants have no defense on the merits and are trying to
9 throw out procedural hurdles to basically prolong the final
10 resolution of the issues in this case, and what we've got here
11 is a situation where the statute of limitations has not tolled
12 on the FLSA claims of the FLSA collective until they have an
13 opportunity to opt in. We need additional discovery to be able
14 to file our motion for additional certification, and this
15 motion is going to delay that. We have a discovery schedule in
16 this case that sets the end of discovery just a month from now.
17 At that point, we'll be able to file our motion for class
18 certification and collective certification, and we think that
19 the appropriate time for defendants to make these arguments is
20 in opposition to our contemplated motions.

21 Just to address briefly the point Ms. Bloom made about
22 certifying a class, it is absolutely not the case that the DOL
23 6.10 or the suffer permit standard here would go against
24 certifying a class at all. The standard is suffer or permit to
25 work. There is no individualized inquiry really at all. It's

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1 just did defendant receive a benefit from the labor of these
2 interns. And it just makes no sense at all to have a motion
3 like this filed at this stage.

4 THE COURT: Thank you.

5 MS. BLOOM: Your Honor, just to pick up on what
6 Ms. Wagoner said, we understand that they're going to want to
7 proceed with their 30(b)(6) deposition and that there may be
8 other discovery that they believe they need in order to file
9 their motion for notice, and we don't object to that. Our
10 point is that we would like to have whatever discovery is done
11 from this point going forward be limited to that which is
12 necessary in order for them to make their motion for notice and
13 in order for them to make their Rule 23 motion.

14 THE COURT: But they're going to make their motion in
15 July. Right?

16 MS. WAGONER: That's right, your Honor.

17 THE COURT: Right, Ms. Bloom?

18 MS. BLOOM: I understand that, but the scope of
19 discovery that they've asked for at this point, and I'm
20 prepared to go through what we've already provided and the
21 parties have been diligent in terms of discovery. Obviously we
22 completed the plaintiffs' depositions. We turned over to them
23 a lot of discovery, but there is a lot more that they've asked
24 for that would go well beyond what would be necessary for a
25 motion for notice and a class certification motion, and the

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1 whole purpose for having Court involvement in that process is
2 so that a defendant is not subjected to broad and very
3 expensive discovery if a case is not ultimately going to
4 certified. So all that we're asking for is for you to at least
5 narrow the scope of what takes place between now and July 20,
6 and then if and when you determine that it can proceed as a
7 collective and/or class action, then obviously we would go to
8 the next phase.

9 THE COURT: All right. I'll fix a schedule. I'm not
10 going to stay discovery in the case.

11 When do you want to file this very exciting motion,
12 Ms. Bloom? Tell me when. I can't give you any more signals
13 than I've given you, but if you want to pursue it, my job is to
14 try to hold down the costs of litigating a case, and I just
15 don't see the point when the plaintiffs have to move in July of
16 standing here on June 4 to tell me you want to make this
17 motion, and they're going to say but discovery isn't complete,
18 and they're right. Discovery isn't complete.

19 MS. BLOOM: Your Honor, given your comments, I'm going
20 to wait for their motion on July 20.

21 THE COURT: Now we're making progress.

22 I want to hear briefly on these arguments relating to
23 the discovery issues, and I will tell you right now that
24 they're pretty complicated and I'm going to try to issue an
25 order resolving them within about a week's time. So, let's

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1 turn to the questions relating to the discovery disputes. Let
2 me begin, I guess, with Ms. Wagoner and Mr. Klein.

3 Don't the interns have a legitimate privacy interest
4 that's threatened if you contact them prior to conditional
5 certification?

6 MS. WAGONER: Your Honor, courts have addressed this
7 argument in the exact same context of Fair Labor Standards Act,
8 contacts prenotice, and have found that whatever privacy
9 interest there may be is outweighed by the need to obtain
10 discovery from witnesses in order to obtain conditional
11 certification and get notice out to the class. And the way
12 that they're going to be contacted is already protected by the
13 ethical rules, which is a sufficient safeguard in this case for
14 any contacts that there may be. It's certainly not,
15 defendant's letter suggested some kind of impropriety that
16 there absolutely would not be, and courts have addressed this
17 argument.

18 THE COURT: How is discovery of corporate interns'
19 contact information relevant if many of those interns received
20 academic credit for their work?

21 MS. WAGONER: Academic credit really has no bearing at
22 all on whether or not they were suffered or permitted to work
23 and whether or not they were employees. There is nothing in
24 law that says that academic credit has any bearing on the
25 standard under the Fair Labor Standards Act. In our view, that

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1 really has nothing to do with whether or not they are witnesses
2 in this case who have information about the duties that they
3 performed, the benefit that they provided to Fox, Fox's
4 involvement in their supervision, and all the other factors
5 that are relevant to the six-point test and whether or not they
6 were suffered or permitted to work. I wouldn't want there to
7 be any confusion on that point. There's no law on academic
8 credit.

9 THE COURT: Can you tell me what PFD agreements are?

10 MS. WAGONER: My understanding is that a PFD
11 agreement, a production finance distribution agreement, is the
12 contract that Fox Searchlight enters into with the shell
13 company that is created to produce a film that lays out the
14 production agreement, basically.

15 One sample agreement was attached to one of our
16 letters, to our June 1 letter. It does not contain budget
17 information and it contains limited information about the terms
18 and conditions of employment of the people who are working on
19 the film. So it certainly is relevant to our claims. It is
20 not enough to determine, and I assume you're asking about it
21 because we want information about budgets and HR policies from
22 Fox, and PFD agreements touch on those issues but do not
23 contain the level of detail that we need to show Fox's control
24 over employees' terms and conditions.

25 THE COURT: How would additional budget information

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1 show Fox's control?

2 MS. WAGONER: The budgets contain line items about
3 every worker who was making the movie. So even low-level
4 workers, like production assistants, who performed the same
5 kind of work that interns performed on films, there's going to
6 be a line item in that budget. And so it's relevant for two
7 reasons.

8 First, to the extent Fox has the ability to sort of
9 approve or modify or decide on what even low-level employees'
10 wages are going to be, that shows Fox's control over terms and
11 conditions of employees working on the films, which would
12 suggest that they have that same control over interns who
13 aren't paid but are still performing those same duties.

14 Second, to the extent that the film is underfunded for
15 that kind of low-level work, that goes to the benefit that Fox
16 received from the interns' labor because, for example, say a
17 film needs five production assistants to do various types of
18 low-level work, one film only has two budgeted that shows that
19 interns were filling that gap.

20 THE COURT: All right. I'm going to put the same
21 question to Ms. Bloom. But why can't you folks work out the
22 situs of a deposition?

23 MS. WAGONER: We believe it should take place in New
24 York. We believe the law supports that. We filed the case in
25 New York. We have New York State labor law claims in this

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1 case. It would be enormously costly and inconvenient to take
2 the depositions in Los Angeles, and it seems uncontroversial to
3 us that the deposition should take place here.

4 THE COURT: Except for the fact that there's a
5 presumption that a witness should be deposed in the district
6 where they work and reside.

7 MS. WAGONER: The presumption exists but can be
8 overcome when there are cost concerns and inconvenience
9 concerns, and we think those are present here. My firm does
10 not have local counsel in California, which would make it very
11 difficult for us to take a deposition in California. It's
12 expensive to go to California. It would require a day of
13 travel both ways for all counsel, and we think that those
14 considerations outweigh the presumption.

15 THE COURT: All right. Let me hear from your
16 adversary.

17 MS. BLOOM: You want me to start with that?

18 THE COURT: Why don't you start with that. It makes
19 my hair hurt when I see parties disputing the situs of a
20 deposition. I mean, in the end, wouldn't it be cheaper all
21 around to just bring the witness to your office in New York,
22 Ms. Bloom?

23 MS. BLOOM: It's not just one witness. These are
24 30(b)(6) depositions, and it's going to be at least two
25 witnesses. They're people who hold high-level positions within

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1 the company. My in-house counsel is also in California. We
2 have offered them --

3 THE COURT: I bet they come to New York pretty
4 frequently.

5 MS. BLOOM: Not these two people. These two people
6 don't.

7 This is brought as a class action. I've offered them
8 the opportunity do it by video teleconference. I've told them
9 that we'll make a conference room available to them, an extra
10 conference room, an office. They can ship their boxes,
11 whatever they need to make it easier for them, absent bringing
12 these two people to New York we're prepared to do.

13 I think the law, especially when you bring a class
14 action, we're talking about one, possibly a day and a half of
15 deposition. I don't know how long they think the 30(b)(6) will
16 take, but we're not talking about eight or nine depositions.
17 We're talking about one trip and we're talking about the
18 depositions of two corporate people who have jobs besides this
19 lawsuit.

20 THE COURT: Look, you cite cases from the Eastern
21 District where courts deny precertification requests for
22 contact information, but don't my colleagues here in the
23 Southern District permit such discovery?

24 MS. BLOOM: Your colleagues do, but there is a
25 difference, and there is a difference in this case. The

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1 plaintiffs have said that what they need this contact
2 information for is because they need to talk to witnesses so
3 they can get information about their investigation. I think
4 it's important for you to know that in terms of contact
5 information for the production of Black Swan that their two
6 clients were interns on, they have the same contact information
7 that we have.

8 With regard to the information for the other films,
9 they have first name, last name, and any business information
10 that we had for anybody that worked on those films. To the
11 extent that we had any personal information for the people on
12 those films, we have not given them that information.

13 For the corporate interns, we have given them and then
14 offered to give some additional information, the first names,
15 the dates, the departments, and we've offered to give the
16 supervisors and offered to tell them whether the supervisors
17 are current or former employees. We believe that they have
18 more than enough in terms of being able to contact potential
19 witnesses with relevant information.

20 Further evidence of that is the fact that from what
21 we've given them, they've been able to contact people, and
22 we've provided you an example of an intern that from the
23 information we gave they were able to do some search on
24 LinkedIn and get in this person's LinkedIn account and send an
25 e-mail to this person, asking this person to contact them. So

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1 it seems to me that the facts demonstrate that they have more
2 than sufficient information about people with potentially
3 relevant information and understanding that we view relevant
4 information differently, but there is certainly no dispute
5 about the fact that they have it all for Black Swan and they
6 certainly have enough to get in contact with other interns
7 because, in fact, they have.

8 As to the communications, and, as I said, I gave you
9 one example, in getting in contact with these people, they are
10 making a representation that the communications are
11 confidential, and it's our position that to the extent these
12 people are witnesses and not their clients that the substance
13 of those conversations would not be confidential and that that
14 is not a representation that should be made.

15 The last thing that I would sort of say on this issue
16 is I don't know if you saw the article by the former intern of
17 The Observer magazine, and I brought a copy for the Court if
18 you didn't get to see it, and while that individual was not an
19 intern on Fox, he talks about his conversations with the Outten
20 & Golden law firm about the potential of them representing him
21 in a lawsuit, which he's declined to do, against The Observer.
22 But if you put all those facts together, we believe that they
23 have well beyond sufficient information to contact people with
24 relevant information and that to provide them with any further
25 names and addresses beyond what we've already given them is not

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1 justified by the facts in this case.

2 THE COURT: Why would it burden Searchlight to turn
3 over the other interns' contact information, their cell phone
4 numbers and their e-mail addresses?

5 MS. BLOOM: First of all, it is a time-consuming
6 process, and, second of all, we believe that their objective in
7 asking for that information is not because they're looking for
8 people with relevant information. It's a fishing expedition to
9 try to get additional information to support their claims in
10 this case. I mean, especially having taken the plaintiffs'
11 depositions, and just so we're all on the same page, neither of
12 the two named plaintiffs got school credit for their
13 internship. So to the extent that they're advancing the fact
14 that the school credit issue is a seminal issue in this case as
15 it relates to the corporate interns, neither of their two named
16 plaintiffs would be an adequate class representative for that
17 group. So we believe that it's a balancing test, that the
18 Court has discretion about whether or not to order the further
19 disclosure of additional names and addresses and that the facts
20 in this case don't warrant it.

21 The only other thing I would say is that the Sperling
22 case, the LaRoche case that I know gets cited a lot, one
23 important distinction that sometimes gets missed when people
24 cite the Sperling case as the basis for discovery of names and
25 addresses of putative class members is that in the Sperling

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1 case there had already been a showing that those additional 200
2 people were similarly situated to the other, I think, 400 who
3 were in the case. We're not there yet. We're not at that
4 similarly-situated point. So if and when we ever get to that
5 point, I understand that the issue of a class list would be
6 relevant, but we are far from that point.

7 The last thing I would point out is that this issue
8 was raised again in the Hearst case and that Judge Baer did not
9 order the turning over of names and addresses of interns at the
10 class certification stage.

11 THE COURT: Couldn't payroll and budget information
12 show the extent of Searchlight's control over the production
13 companies and their interns?

14 MS. BLOOM: We don't believe that additional
15 information beyond what we gave will go to the control factor.
16 Fox Searchlight's relationship with each of these production
17 companies is governed by the agreement of which you've been
18 provided a sample.

19 We also have agreed to give any policies that would
20 have been generated from Fox that would apply to interns that
21 are providing services for the production companies. What
22 they're asking for are things like drafts of budgets or line
23 item budgets, and that may go to how a particular production
24 company staffed their production, but it doesn't go to whether
25 or not there's a joint employer relationship and whether or not

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1 Fox actually exercised control over any particular intern who
2 may have been providing services on a particular production.
3 We believe they have more than enough information to at least
4 address the joint employer question, and again, that's one of
5 the things that is going to be explored through a 30(b)(6), and
6 the PDF agreements, plus the policy and plus some of the ESI
7 searches, we believe, gives them more than adequate information
8 and that they don't need additional budget information and that
9 it will not shed any more light on whether or not and, if so,
10 to what extent a joint employment relationship existed between
11 Fox and any intern on any production.

12 THE COURT: But whether the plaintiffs have, as you've
13 characterized it, enough information isn't the test, is it, for
14 what's discoverable?

15 MS. BLOOM: We don't believe that the day-to-day
16 budget information is going to be probative of the question of
17 whether or not somebody from Fox Searchlight controlled the
18 day-to-day duties and responsibilities of an intern who was
19 providing services on a particular film. I don't want to
20 misstate my recollection of the case law, but I don't believe
21 that budget concerns is an indicia of the joint employment
22 relationship.

23 THE COURT: Thank you.

24 Mr. Klein, did you want to be heard?

25 MR. KLEIN: Yes, your Honor. Just very briefly. In

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1 response to The Observer article, if I may respond to it.

2 THE COURT: By the way, I'll take a copy of it.

3 MR. KLEIN: Just very briefly.

4 THE COURT: Out of curiosity.

5 MR. KLEIN: More for comic relief than for any other
6 value.

7 THE COURT: I can always use that.

8 MR. KLEIN: A very young reporter came and said, I'm a
9 reporter for The Observer, and they're not paying me for any
10 wages. And I said, That's terrible, you should get paid for
11 your work, and he wrote an article.

12 In terms of the contact list information, a common
13 tactic, perhaps they won't do it here, but a common tactic in
14 response to a class action or a cause of action certification
15 motion are what we call happy camper declarations. These are
16 declarations by absent class members submitted by the defendant
17 in opposition to collective or class action certification.
18 They have access to their contact list. They make use of it,
19 routinely, this firm Proskauer does.

20 In fact, in the case Gristede's case, this same firm,
21 Proskauer, submitted affidavits from our absent class members,
22 none of whom spoke English as a first language. Nonetheless,
23 they produced affidavits in opposition in that litigation.
24 It's a common tactic. So it's a sword-and-shield problem.

25 One other very small point. They cite the Dukes in

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1 support of the idea of certifying a class action. Ironically
2 enough, and Judge Francis just observed this in the Chen-Oster
3 v. Goldman Sachs, that Dukes provides for additional discovery
4 because it heightened the bar in terms of the requirements for
5 certifying a class action. The merits matter. Dukes follows
6 the IPO decision out of the Second Circuit enhancing or raising
7 the bar in terms of what evidence needs to be submitted to the
8 court in support of a class certification. A higher standard
9 means more discovery. So the idea that somehow Dukes supports
10 the idea that there should be a limitation on discovery runs
11 directly counter to the holding of Dukes and also IPO.

12 THE COURT: Counsel, thank you for your presentations.
13 I'm reserving decision. I expect to issue an order resolving
14 these disputes early next week. All right? Thanks.

15 (Proceedings adjourned)

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